STATE OF MICHIGAN

COURT OF APPEALS

DANIEL BOYNTON, Plaintiff-Appellee,	UNPUBLISHED September 30, 2008
v	No. 277352 Washtenaw Circuit Court
ALLSTATE INSURANCE COMPANY, Defendant-Appellant.	LC No. 04-000801-NF

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

In this insurance dispute, defendant appeals as of right from a judgment in favor of plaintiff, following a jury trial. The jury, by special verdict, found defendant liable for personal protection insurance (PIP) benefits, including attendant care and other medical expenses, under the no-fault act, MCL 500.3101 *et seq.* We affirm.

I. Facts and Procedural History

In 1991, plaintiff, then 19 years old, was in a motor vehicle accident in which his head struck the steering wheel. After the accident, plaintiff experienced headaches, dizziness, vision problems, and loss of concentration and memory. Plaintiff also became irritable, violent, abusive, and experienced suicidal and homicidal thoughts. Plaintiff's doctors diagnosed him with a minor traumatic brain injury as a result of the accident. Over the years, plaintiff has continued to have difficulties related to the injury and has been admitted to rehabilitation facilities on several different occasions.

After the accident plaintiff met Amy White who quit her job in order to provide attendant care services to plaintiff. At the time, plaintiff resided with his parents and White eventually moved in with plaintiff and his parents to care for plaintiff. Plaintiff's difficulties continued and, in 2001, White and plaintiff moved to Ann Arbor so that plaintiff could attend out-patient programs at the Ann Arbor Rehabilitation Center. Plaintiff married White in 2003. Plaintiff and White then moved back to Bay City, but in February 2005, plaintiff started spending weekdays at the Ann Arbor Rehabilitation Center and returning to Bay City on the weekends. In June 2005, plaintiff and White separated and plaintiff began permanently residing at the Ann Arbor Rehabilitation Center. Plaintiff and White divorced soon after.

Plaintiff has continued to reside at the Ann Arbor Rehabilitation Center. Although plaintiff spends approximately 8 to 10 hours a day alone, he has access to staff members 24 hours a day through telephone. Staff members remind plaintiff daily to shower, make him exercise, and assist him with his grocery shopping. The center also schedules time for plaintiff to "go out in the community." In 2005, the center charged a per diem rate of $510 per day. That rate increased on $520.20 per day in 2006. Terry Braciszewski, a neuropsychologist and rehabilitation psychologist, is the director and owner of the Ann Arbor Rehabilitation Center. He testified that approximately $50 of the per diem charge represented room and board.

Although defendant paid plaintiff PIP benefits in the past, defendant discontinued those benefits in July 2004, alleging that plaintiff's injury was not accident-related. White estimated that her unpaid attendant services total $39,480. All other unpaid services, including treatment at the Ann Arbor Rehabilitation Center and physicians' services, totaled $366,869.66. Plaintiff filed the instant action seeking payment of these PIP benefits.

Prior to trial, defendant moved for a protective order pursuant to MCR 2.302(C)(7) seeking to limit certain treating physicians' depositions to "discovery only." Defendant asserted "given the nature of the claimed injury and given the question of causation of plaintiff's mental and emotional problems, a protective order is necessary so that the defendant will have the opportunity to explore discoverable issues." It also asserted "it is necessary to conduct 'discovery only' depositions of the treating doctors because the defense intends to explore their opinions with regard to causation and the specific basis for their opinion, including literature upon which they base their opinion." The court denied the motion, finding defendant failed to establish "good cause" under MCR 2.302(C)(7) to justify such an order.

After trial, the jury found that plaintiff sustained an accidental bodily injury caused by the 1991 motor vehicle accident, and awarded plaintiff $39,480 for White's attendant care services, $366,869.66 for all other medical expenses, but zero for room and board. The jury also found that plaintiff was owed interest of $50,000 for overdue benefits. The trial court entered judgment for plaintiff based on the jury's verdict.

Defendant then moved for judgment notwithstanding the verdict (JNOV), or alternatively for a new trial, arguing that plaintiff's housing at the Ann Arbor Rehabilitation Center was not an "allowable expense" under the no-fault act. It further sought a new trial asserting that the trial court's denial of defendant's request to depose plaintiff's treating physicians resulted in defendant being unable to defend against testimony regarding the reasonable and customary charges for rehabilitation centers similar to the Ann Arbor facility. The court disagreed with defendant's claim that it had denied defendant's request to depose plaintiff's physicians and denied defendant's motion finding the evidence supported the jury's verdict.

II. Standards of Review

A motion for JNOV "may be joined with a motion for a new trial, or a new trial may be requested in the alternative." MCR 2.610(A)(1). We review a trial court's denial of a motion for JNOV de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). Reversal of the trial court's denial is proper only if the evidence, viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646

(2005). We review a trial court's decision regarding a motion for a new trial for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). Lastly, we review the trial court's decision regarding discovery for an abuse of discretion. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004). The interpretation of a court rule is a question of law that we review de novo. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003).

III. Motion for JNOV or for a New Trial

Defendant argues that the trial court erred when it denied defendant's motion for JNOV because plaintiff's treatment at a semi-independent residential rehabilitation center is not an "allowable expense[]" under the no-fault act. Specifically, it challenges the residential component of the Ann Arbor Rehabilitation Center's charges.[1] The evidence at trial indicated that plaintiff was charged a per diem rate for the semi-independent care that he received on the campus of the Ann Arbor Rehabilitation Centers, a closed-head injury facility, beginning in 2005. The initial rate was $510 a day, but was later increased to $520.20 a day. According to testimony of psychologist Terry Braciszewski, the owner of the facility, the apartment setting that is provided for certain clients on the campus of the facility is intended to help them gradually develop community-based skills so that they can become as independent as possible. It provides supervision for clients where group living may not be appropriate. Each client is given a weekly schedule and a team of professionals from the facility to work on his or her goals. In the event that the room and board component of the semi-independent care was not recoverable, Braciszewski estimated that a reasonable amount to allocate to room and board would be $50 a day, but found it difficult to make any estimate because the program was a comprehensive one designed to do whatever it takes to assist the clients.

MCL 500.3107(1)(a) provides that PIP benefits are payable for:

> Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation.

In other words, an insurer will not be liable for PIP benefits if the product, service, or accommodation is not reasonably necessary for the injured person's care, recovery, or rehabilitation, or to the extent that the expense is not a reasonable charge for the product, service, or accommodation. *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass'n*, 274 Mich App 184, 194; 731 NW2d 481 (2007); MCL 500.3107(1)(a). Our Supreme Court recently construed the meaning of MCL 500.3107(1)(a) and noted that the terms "recovery" and "rehabilitation" refer to "products, services, and accommodations that are necessary *because of* the injuries sustained through the use of a motor vehicle," while the term

[1] Defendant does not challenge the jury's determination that plaintiff incurred allowable expenses arising out of accidental bodily injury.

"care" refers to "products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident." *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 535; 697 NW2d 895 (2005) (emphasis in original). As such, reasonable costs for products, services, and accommodations are "allowable expenses" only if the "care, recovery, or rehabilitation" is related to the injury that the party sustained in the motor vehicle accident.

Defendant does little to relate its JNOV argument to the actual verdict rendered by the jury and it fails to address precisely what judgment it proposes should be rendered in its favor. Where a party gives only cursory treatment to an issue on appeal, this Court need not consider it. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). In any event, the special verdict form used in this case enables this Court to determine what the jury actually decided. *Sudul v City of Hamtramck*, 221 Mich App 455, 458; 562 NW2d 478 (1997). It enables any error to be localized so that only potentially unsound portions of the verdict are subject to redetermination at a new trial. *Id.* at 459. The jury awarded plaintiff the entire sum that he claimed for outstanding medical bills, i.e., $406,349.66. The jury specifically awarded $39,480 for attendant care expenses, and $366,869.66 for all other medical expenses.[2]

Defendant, relying on *Griffith*, *supra* at 521, argues that plaintiff's accommodation at the rehabilitation center is not an allowable expense under MCL 500.3107(1)(a) because plaintiff did not need such care as demonstrated by the fact that plaintiff lived independently with White after the accident. Defendant's reliance is misplaced. In *Griffith*, the Supreme Court determined that food is not an allowable expense under MCL 500.3107(1)(a) where the injured party is receiving at-home care and does not have any special dietary needs related to the injury. *Griffith*, *supra* at 536. In this case, plaintiff is not receiving at-home care. Rather, plaintiff is a part of a semi-independent residential rehabilitation program specifically tailored to plaintiff's injury-related cognitive and psychological impairments.

We further disagree with defendant's argument that the fact that the treatment change occurred at a time when plaintiff's marriage was deteriorating precluded the jury from finding that the residential component of the program was an allowable expense. Viewing the evidence in a light most favorable to plaintiff as we must, the case did not involve evidence of a simple loss of housing associated with a deterioration of the marriage, but rather a marriage that deteriorated because plaintiff's wife could not deal with consequences of plaintiff's head injury. Moreover, defendant's argument must fail because the statute does not bar PIP benefits if, at some previous point in time, the injured party lived independently and was cared for in-home. The fact that plaintiff, in this matter, was once cared for in-home by White, who can no longer care for plaintiff, does not render the necessary services and accommodations for plaintiff's injury unnecessary or unreasonable. On this record, reasonable jurors could find that the accommodations and services provided by the rehabilitation center are measures necessary for the "care, recovery, or rehabilitation" of plaintiff and that this "care, recovery, or rehabilitation" is related to the injury plaintiff sustained in the 1991 motor vehicle accident.

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[2] The jury specifically declined to allocate any of the charges to room and board in the special verdict form, despite being asked to do so by plaintiff's attorney in closing argument.

Defendant has not presented any justification for JNOV with respect to any issue actually decided by the jury. At best, defendant's argument suggests that the amount awarded by the jury for other medical expenses is excessive, thereby inviting the question of whether, in the alternative, a new trial should be ordered with respect this issue. But defendant does not present any additional argument with respect to its alternative motion for a new trial. Because defendant gives the denial of its motion for new trial only cursory treatment on appeal, we deem the issue abandoned and we do not consider it. *Peterson Novelties, Inc*, *supra* at 14.

IV. Motion for Protective Order

Defendant next argues that the trial court abused its discretion when it denied defendant's pretrial motion for "discovery only" depositions of certain physicians under MCR 2.302(C)(7). We disagree.

Parties generally are permitted to obtain discovery regarding any unprivileged matter that is relevant to the subject matter of the lawsuit. MCR 2.302(B)(1); *Cabrera v Ekema*, 265 Mich App 402, 407; 695 NW2d 78 (2005). However, under MCR 2.302(C), a trial court, for good cause shown, may protect an opposing party or person from excessive, abusive, or irrelevant discovery requests. *Cabrera*, *supra* at 407. MCR 2.302(C)(7), provides in relevant part:

> On motion by a party or by the person from whom discovery is sought, and on reasonable notice and *for good cause shown*, the court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following orders:
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> * * *
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> (7) that a deposition shall be taken only for the purpose of discovery and shall not be admissible in evidence except for the purpose of impeachment. [Emphasis added.]

Absent such protection, "[d]epositions or parts thereof shall be admissible at trial or on the hearing of a motion or in an interlocutory proceeding only as provided in the Michigan Rules of Evidence." MCR 2.308(A).

Our review of the record reveals that defendant failed to provide good cause that would justify limiting the treating physicians' depositions to "discovery only." Defendant, in its pre-trial motion brief, stated that "it is necessary to conduct the 'discovery only' depositions of the treating doctors *because the defense intends to explore their opinions with regard to causation* and the specific basis for their opinion, including literature upon with they base their opinion" (Emphasis added). By proceeding under MCR 2.307(C)(7), defendant sought to exclude at trial, except for the purpose of impeachment, deposition testimony directly relevant to a central issue in this case: whether the motor vehicle accident caused plaintiff's injury. We fail to see how the nature of this testimony alone provides "good cause" for limiting the physicians' depositions to "discovery only" and defendant, on appeal, has not cited any authority or provided any other justification in support of its argument.

We also find no merit in defendant's additional reason for justifying "discovery only" depositions, which defendant did not provide in its initial motion, but rather only in its motion for JNOV. According to defendant at the hearing on the motion for JNOV, because its request for depositions of plaintiff's treating physicians was denied, defendant was "surprised" when one of the physicians testified the rates charged at the Ann Arbor Rehabilitation Center were reasonable. However, the trial court did not preclude defendant from taking a deposition. The record shows that the trial court requested defendant to provide a "good cause" reason that would justify the imposition of a protective order for a "discovery only" deposition as required by MCR 2.302(C)(7). Defendant voluntarily chose not to conduct an ordinary deposition. Had defendant deposed the physician, it could have avoided the surprise it now complains of. A party cannot successfully argue reversible error on appeal when that alleged error is due to the party's own conduct. See cf. *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004).

Lastly, we reject defendant's argument that the trial court's ruling reflects a policy of never permitting "discovery only" depositions. Rather, the record shows that the trial court called on defendant to provide a reason for a protective order. Defendant made no showing that a protective order was necessary to protect it or a person from annoyance, embarrassment, oppression, or undue burden or expense. In substance, defendant's motion appeared to be nothing more than an attempt to preclude the trial court from entertaining any possible offer by plaintiff to use the deposition at trial for a purpose other than impeachment. Defendant offered no good cause in support of its motion, let alone to support an order that would limit the evidentiary use of the deposition to impeachment. The trial court did not abuse its discretion by refusing to issue a protective order.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly